# Public Prosecutor v Audrey Keong Mei Cheng

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W-05-96 OF 1995
SHAIK DAUD, AHMAD FAIRUZ, MOKHTAR SIDIN JJCA
20 JANUARY 1997

***Criminal Procedure*** *— Police investigation — Application for further detention under s 117 — Whether magistrate should consider the lawfulness of the arrest — Criminal Procedure Code (FMS Cap 6) s 117*

***Criminal Procedure*** *— Police investigation — Application for further detention under s 117 — Failure to produce investigation diary — Whether mandatory for a copy of the diary to be supplied to the court — Whether letter setting forth the facts upon which the detention order was requested for was sufficient — Criminal Procedure Code (FMS Cap 6) s 117*

The respondent's husband was charged with the offence of criminal breach of trust ('the offence'). In the course of investigation, it was ascertained by the police that the respondent was in possession of share scripts and money pertaining to the offence. The respondent allegedly agreed to surrender the scripts and money over to the police but failed to do so. She was subsequently arrested and an application was made to the magistrates' court for an order to extend her detention under s 117 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The application was rejected by the registrar on the ground that the arrest was unlawful and the respondent was ordered to be released. The Public Prosecutor applied to the High Court for a revision of the registrar's order under s 325 of the CPC. However, the judge affirmed the registrar's findings and dismissed the application. The prosecution appealed against the judge's decision.

The issues before the court were whether: (i) the registrar was right in law in rejecting the s 117 application on the ground that the arrest was unlawful; and (ii) the provisions of s 117 had been complied with in the application. The record of proceedings showed that no investigation diary, as envisaged by s 117, was produced before the registrar; only a letter setting forth the facts upon which the detention order was requested for was produced.

**Held**, dismissing the appeal:

(1) At the further detention stage, the magistrate is not to be concerned with the issue of the legality or otherwise of the arrest of the applicant. To do so would require the magistrate to embark on an enquiry which may in turn necessitate the calling of witnesses which is not the intention of s 117. The purpose of s 117 is to enable persons arrested under s 28 of the CPC to be detained for longer than 24 hours where it appears that the investigation cannot be completed within that period. What the magistrate has to decide at that stage is whether there are any

grounds for believing that the accusation or information is well founded. Therefore, the registrar was wrong in law in ordering the release solely on the ground that the arrest was unlawful (see p 481E–H). A

(2) Section 117 makes it mandatory for an investigating officer seeking a detention order of an arrested person from a magistrate to produce a copy of the investigation diary (as prescribed under s 119 of the CPC). In this case, the records showed that no such diary was produced before the magistrate. The fact that a letter setting out the circumstances of the application was produced did not satisfy the requirement. Therefore, on this ground, the registrar was right, albeit for a different reason, in refusing to order the further detention of the respondent (see p 482C–F, H–I). B C

(3) Furthermore, the contents of the letter only showed that the respondent would, in all probability, only be a potential witness against her husband. It would be an abuse of law for the police to use s 117 to compel witnesses or potential witnesses to assist in their investigation. There are other provisions of the CPC for this purpose (see p 482G–H). D

**Per curiam:**

In exercising his revisionary powers under s 325 of the CPC, the judge ought to confine himself only to the record of the proceedings and nothing else. An application for revision is essentially a criminal proceeding, therefore affidavit evidence has no place in such proceedings (see pp 482I and 483A–B). E

**[Bahasa Malaysia summary** F

Suami penentang dipertuduhkan dengan kesalahan pecah amanah jenayah ('kesalahan tersebut'). Semasa penyiasatan berjalan, ia dipastikan oleh polis bahawa penentang memiliki skrip saham dan wang berkaitan dengan kesalahan tersebut. Penentang dikatakan telah bersetuju menyerah skrip-skrip dan wang kepada polis tetapi gagal berbuat demikian. Dia kemudiannya ditangkap dan suatu permohonan telah dibuat kepada mahkamah majistret untuk perintah melanjutkan tahanannya di bawah s 117 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Permohonan telah ditolak oleh pendaftar atas alasan bahawa tangkapan adalah menyalahi undang-undang dan penentang diperintahkan supaya dibebaskan. Pendakwa Raya memohon kepada Mahkamah Tinggi untuk penyemakan perintah pendaftar di bawah s 325 KAJ. Walau bagaimanapun, hakim mengesahkan keputusan dan menolak permohonan itu. Pihak pendakwaan merayu terhadap keputusan hakim. G H

Isu-isu di hadapan mahkamah adalah sama ada: (i) pendaftar adalah betul di sisi undang-undang dalam menolak permohonan s 117 atas alasan bahawa tangkapan menyalahi undang-undang; dan (ii) peruntukan s 117 telah dipatuhi dalam permohonan. Rekod I

A prosiding menunjukkan bahawa tiada catatan harian penyiasatan telah dikemukakan di hadapan pendaftar, seperti yang dibayangkan oleh s 117; cuma sepucuk surat yang menyatakan fakta atas mana perintah tahanan diminta dikemukakan.

B **Diputuskan**, menolak rayuan:

(1) Pada tahap tahanan lanjutan, majistret tidak patut mengambil berat tentang isu kesahan tahanan pemohon atau sebaliknya. Untuk berbuat demikian majistret perlu melancarkan siasatan yang pula mungkin menghendaki saksi dipanggil yang bukan merupakan tujuan s 117. Tujuan s 117 adalah untuk C membolehkan orang yang ditahan di bawah s 28 KAJ supaya ditahan untuk tempoh melebihi 24 jam di mana ia kelihatan bahawa siasatan tidak boleh diselesaikan dalam tempoh itu. Apa yang harus diputuskan oleh majistret pada tahap itu adalah sama ada terdapat sebarang alasan untuk mempercayai bahawa tuduhan D atau maklumat adalah kukuh. Oleh itu, pendaftar terkhilaf dalam memerintahkan pembebasan semata-mata atas alasan bahawa tangkapan menyalahi undang-undang (lihat ms 481E–H).

(2) Seksyen 117 menjadikannya mandatori untuk seseorang pegawai penyiasat yang memohon perintah tahanan atas orang yang ditangkap supaya mengemukakan sesalinan catatan harian siasatan E daripada majistret (seperti yang ditetapkan di bawah s 119 KAJ). Dalam ke ini, rekod menunjukkan bahawa tiada catatan harian sedemikian telah dikemukakan di hadapan majistret. Fakta bahawa sepucuk surat yang menyatakan keadaan permohonan telah dikemukakan tidak memenuhi keperluan itu. Maka, atas F alasan ini, pendaftar adalah betul, meskipun atas alasan yang berbeza, dalam keengganan untuk memerintahkan tahanan lanjutan penentang (lihat ms 482C–F, H–I).

(3) Tambahan pula, kandungan surat hanya menunjukkan bahawa dalam semua kemungkinan penentang cuma menjadi saksi potensi terhadap suaminya. Adalah penyalahgunaan undang-undang G untuk polis menggunakan s 117 bagi memaksa saksi-saksi atau saksi potensi supaya membantu dalam siasatan mereka. Terdapat peruntukan lain dalam KAJ untuk tujuan ini (lihat ms 482G–H).

**Per curiam:**

H Dalam melaksanakan kuasa penyemakan di bawah s 325 KAJ, hakim sepatutnya membatasi diri kepada rekod prosiding sahaja dan bukan yang lain dari itu. Suatu permohonan untuk penyemakan pada dasarnya adalah prosiding jenayah, maka keterangan afidavit tidak sesuai dalam prosiding demikian (lihat ms 482I dan 483A–B).]

I

**Notes**

For cases on police investigation, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1861–1961.

**Legislation referred to**

Criminal Procedure Code (FMS Cap 6) ss 117, 119, 325
Penal Code (FMS Cap 45) s 409

*Kamaruzzaman bin Abdul Jalil* (Deputy Public Prosecutor) for the appellant.

*Yusuf Khan* (*Yusuf Lee Pathma & Marbeck*) for the respondent.

*Cur Adv Vult*

**Shaik Daud JCA** (delivering the judgment of the court): This is an appeal by the Public Prosecutor from the decision of the High Court which had rejected an application by the Public Prosecutor to exercise its revisionary powers.

The facts of the case are that on 14 April 1994, as a result of a police report vide Jalan Bandar Report No 6191/94, the police arrested one Lim Chin Teik, the husband of the respondent in this appeal. On 5 May 1994, the said Lim Chin Teik was formally charged in the Sessions Court, Kuala Lumpur, for an offence of criminal breach of trust under s 409 of the Penal Code (FMS Cap 45). He claimed to be tried and was released on bail of RM500,000.

In the course of their investigation, the police ascertained that the respondent was in possession of share scripts and money pertaining to the criminal breach of trust case. On 29 April 1994, the respondent turned up at Bukit Aman where her husband, the said Lim Chin Teik, was detained, and allegedly agreed that she would surrender all the share certificates and cash RM70,000.

She failed to do so and thereafter never turned up at Bukit Aman. On 11 May 1994 at about 10.30am, Corporal 64212 Hamidah bte Abdul Rahman happened to meet the respondent at Block K13, Magistrate's Court, Jalan Duta and immediately arrested her. She was taken into custody and on the next day, 12 May 1994 at about 8.15am, she was produced before Registrar Puan Fadzilah Masaya bte Mazlan to be detained further under s 117 of the Criminal Procedure Code (FMS Cap 6) ('the CPC').

The learned registrar rejected the application on the sole ground that the arrest of the respondent was unlawful and directed the respondent to be released. Against this order of the registrar, the Public Prosecutor applied to the High Court for the learned judge to exercise his revisionary powers under s 325 of the CPC. After the hearing the arguments, the learned judge agreed with the registrar's finding and order, and declined to exercise his revisionary powers.

This appeal is on a fundamental point of law on arrest and detention under s 117 of the CPC. Section 117 provides:

(i) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-

four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation *shall forthwith transmit to the magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such magistrate*;

(ii) The magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as such magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another magistrate having jurisdiction with a view to commital for trial by the High Court.

(iii) A magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(Emphasis added.)

The issue before the High Court and before us is whether the learned registrar was right in law in rejecting the application for further detention of the respondent on the ground that her arrest was unlawful. The learned judge was of the view that in order for a magistrate to exercise her discretion under s 11 of the CPC, the arrest in the first place must be a lawful arrest. The learned deputy public prosecutor submitted before us that it was not the duty of the magistrate at that stage, ie application under s 117 of the of the CPC, to question the legality or otherwise of the arrest. We agree with the contention of the learned deputy public prosecutor. On our perusal of the provision of s 117 of the CPC, we could not find anywhere in that section to show that before a magistrate can act under that section, the magistrate has to be satisfied on the legality or otherwise of the arrest. We are of the view that at that stage of the proceedings, the magistrate is not to concern himself or herself on the issue of the legality or otherwise of the arrest. It is not for the magistrate to decide on the legality or otherwise of the arrest. To do so would require the magistrate to embark on an enquiry which may in turn necessitate the calling of witnesses. That, to our mind, is not the purport of s 117 of the CPC. Section 117 of the CPC is a machinery to enable persons arrested under s 28 of the CPC, to be detained in custody for longer than 24 hours where it appears that investigations cannot be completed within that period. What the magistrate has to decide at that stage is whether there are grounds for believing that the accusation or information is well founded. Therefore, in this case, we are of the view that the learned registrar was wrong in law when she ordered the release of the respondent solely on the ground that the arrest was unlawful.

Apart from the issue of the legality or otherwise of the respondent's arrest, we think that learned counsel for the respondent is on a firmer ground when he raises the issue as to whether in this case the provisions of s 117 of the CPC had been complied with when the respondent was produced before the registrar.

Section 117 of the CPC provides that the police officer making the investigation shall forthwith transmit to the magistrate 'a copy of the enteries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such magistrate'. The diary herein mentioned, has been prescribed in s 119 of the CPC which provides that every police officer making a police investigation shall day by day enter his proceedings in the investigation in a diary setting forth the time at which the order, if any, for investigations reached him, the time at which he began and closed investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. Section 117 of the CPC makes it mandatory for the police officer seeking a detention order of an arrested person to produce a copy of such a diary, failing which a magistrate ought not to entertain the application.

In the present case, let us examine whether the provisions of s 117 of the CPC has in fact been complied with. It cannot be gainsaid that where the liberty of a citizen is to be curtailed, the law must be adhered to strictly. The record in the present case, shows that no such copy of the diary, as envisaged by s 117 of the CPC, was produced before the registrar. What was in fact produced was a letter dated 12 May 1994, addressed to the magistrate from Latt Mastura bte Mansor from Cawangan Siasatan Jenayah Perdagangan, Bukit Aman, setting forth the facts upon which a detention order was requested for. The fact that a letter was produced before the registrar, was conceded by the learned deputy public prosecutor both in the High Court and in this appeal. He further conceded that it was not a copy of the diary as envisaged by s 117 of the CPC.

In our judgment, it is mandatory for the police to produce a copy of the diary as prescribed by s 119 of the CPC. The details in such a diary would provide a true picture of the proceedings in the investigation in compliance with s 119 of the CPC. Since the police, in this case, failed to do this, the registrar would be right, in law, to refuse to order the further detention of the respondent. Furthermore, on our perusal of the contents of the 'letter', we find that nowhere has it been shown that the respondent has committed or been involved in any offence to justify her further detention in order to complete the investigation. On the contrary, the information shows that she would, in all probability, only be a potential witness against her husband. We would, without hesitation, hold that it would be an abuse of the process of law for police officers to use the machinery of s 117 of the of the CPC to compel witnesses or potential witnesses to come forward to assist them in their investigations. There are other provisions in the of the CPC for this purpose.

Therefore, in our judgment, since the provisions of s 117 of the CPC has not been remotely complied with, the registrar was right albeit for a different reason, not to order further detention of the respondent.

Before leaving the subject, we would like to make one other observation. During the proceedings before the High Court, a number of affidavits were filed both by the prosecution as well as by the respondent for the consideration of the learned judge. In exercising his powers under s 325 of the CPC, the learned judge has to satisfy himself as to the

correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior court. In order to do this, he has to examine the record of the proceedings of which has been called for by himself or, as in this case, which otherwise comes to his knowledge. In exercising his discretion, the learned judge ought to confine himself only to the record of the proceedings and nothing else. An application for revision being essentially a criminal proceeding, it is our view that affidavit evidence has no place in such proceedings.

For the above reasons, we dismiss this appeal.

*Appeal dismissed.*

Reported by Lim Kuan Yew